YEAP PENG HIN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NO. 42(52)-3-85]
28 JUNE 1991

CRIMINAL PROCEDURE: *Findings of learned President - Grounds for conviction - Whether there was a misdirection - Motive - Credibility of witnesses - Appellant not examined on crucial points - Effect of - Appellate Court not to interfere in issues of credibility - Exceptions - Violent conflict of evidence - Prevention of Corruption Act 1961, ss. 4(a), 14.*

The appellant Y, a customs officer was convicted of an offence of corruptly accepting a gratification in contravention of s. 4(a) of the Prevention of Corruption Act 1961 and sentenced to 1 day's imprisonment and a fine of RM2,000 in default of 9 month's imprisonment. Y appealed against conviction and the public prosecutor appealed against the sentence as being manifestly inadequate.

The prosecution case was that Y had accepted an Akai Tuner as an inducement to allow one Y to take other units of the Akai Stereo set out of Swettenham Pier without paying the necessary customs duties. These allegations were denied by Y.

The grounds of judgment of the learned President clearly indicated that the decision of the learned President turned entirely upon his assessment of the credibility of witnesses and of the accused, no question of law being involved.

The question before the Court was whether the trial Judge had fallen into error in reference to objective facts and documents, the witnesses' motives and the overall probabilities of the case.

Held:

[1] On the facts and evidence in this case, there had been a misdirection by the learned President himself on the question of motive. That misdirection was an error which influenced the learned President overmuch for the importance he demonstrably attached to his mistaken view of an absence of motive which coloured his final approach to the issue of credibility.

[2] The appellant's version regarding an important episode was not even mentioned much less discussed and rejected by the learned President. In all fairness to the appellant, his version should not have found dismissal in silence; some repetition of the defence case will now be inevitable. The appellant's version regarding these facts, it will be recalled, was corroborated by the testimony of the forwarding agent.

[3] The audacity of the alleged misdeed that is, allowing Y to remove the goods, without levying any duty thereon, is lacking alike in cunning and in contrivance. It was difficult to associate simplicity so absolute with a course so perilous, yet nowhere in his grounds of judgment did the learned President even mention this formidable factor which was in favour of the appellant.

[4] If the appellant's version of the events on the night in question were true, the conduct of PW8 and PW9 in attempting to take uncustomed goods, on which they knew that duty had not been paid, through the security gate, without attracting the attention of the appellant, was perhaps understandable. This was another factor which the learned President would appear to have overlooked.

[5] In his grounds of judgment the learned President made what seems to be the somewhat reluctant concession that "*prima facie*, standing alone, the entry in the Customs Occurrence Book is in the accused's favour" but then immediately added that "the evidence of PW8, PW9 and PW5 destroyed the veracity of that entry". This conclusion begged the question, since the credibility of these prosecution witnesses was itself a live issue from beginning to end and from first to last of this long and tedious trial.

[6] The appellant was never cross-examined on the entry in the Customs Occurrence Book and was therefore denied the opportunity of explaining what at best was only an apparent discrepancy. At no time while the appellant was in the witness box did the prosecution or the learned President put a single question to him suggesting that the entry in the customs occurrence book was a lying entry prepared in the circumstances suggested by the learned President in order to bolster his defence. The appellant was thus given no real chance of dealing with that suggestion.

[7] If it is an essential part of the prosecution case that the defence evidence should be disbelieved, then the prosecution ought to examine the appellant to indicate to the appellant that his evidence on point was not accepted.

[8] Had the learned President approached the question of the credibility of the forwarding agent from all angles, as he undoubtedly should have, instead of adopting a Nelsonian approach, he would most probably have not rejected the testimony of this witness. And, it goes without saying that had the learned President accepted the testimony of this forwarding agent, he being apparently an independent witness with no axe to grind, then there would have been corroboration of the appellant's defence of the most potent kind and, on this further ground also, the prosecution case must surely have collapsed.

[9] Although it is trite that an appellate Court would not interfere with the finding of facts, it must be emphasised that demeanour alone is not a touchstone of truth.

[10] A Judge of fact should test the oral evidence by reference to the objective facts, the contemporary documents (if any), the witness' motives, and the probabilities of the case.

[11] Accordingly as in this case where the trial Judge had fallen in error in relation to objective facts and documents, witnesses' motives and to the overall probabilities then the Appellate Court will act upon its own view of the conflicting evidence.

[12] Where as in this case there is a violent conflict of evidence and where the issues are so great, an Appellate Court is entitled, and indeed obliged to consider carefully whether the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

[13] It was manifestly clear that the learned President had failed to take into account or to give proper weight to, or to draw proper inference from virtually every fact in favour of the appellant.

[14] In light of the factors enumerated above, the grounds of judgment of the learned President was wholly unsatisfactory. The learned President ought to have ruled at the close of the defence case that the explanation given by the appellant was both reasonable and probable and more than sufficient to rebut the presumption under s. 14 of the Prevention of Corruption Act 1961.

[Appeal allowed, conviction quashed, sentence set aside and the appellant acquitted and discharged; prosecution's appeal against sentence dismissed.]

Cases referred to:
Armagas Ltd. v. Mundogas SA ("The Ocean Frost") [1985] 1 Lloyd's Rep 1 ***(cons)***
Bigsby v. Dickinson [1876] 4 Ch D 24 ***(cit)***
Coglan v. Cumberland [1898] 1 Ch D 24 ***(cit)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(cit)***
R v. Hart 23 CAR 2021 ***(cit)***
Watt Or Thomas v. Thomas [1947] AC 488 ***(foll)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 4(a), 14

For the appellant - Ranjit Singh; M/s. Jag Jit Singh & Co.
For the respondent - S. Selvanathan, DPP, Anti Corruption Agency

JUDGMENT

Edgar Joseph Jr J:

I had allowed this appeal against conviction some two weeks ago and indicated then that I would give my reasons for decision in writing. I now proceed to do so.

The appellant, a customs officer, attached to the department of customs, Penang, had been convicted by the President Sessions Court, George Town, of an offence of corruptly accepting a gratification in contravention of s. 4(a) of the Prevention of Corruption Act 1961, and sentenced to 1 day's imprisonment and a fine of RM2,000 in default to 9 months' imprisonment.

Specifically, the charge of which the appellant had been convicted was in the following terms:

> That you on 17 June 1978, at the Swettenham Pier, Georgetown, in the State of Penang, being an agent of the Royal Customs and Excise Department, Penang, to wit, a customs officer, did corruptly accept for yourself a gratification, to wit, an 'Akai Tuner' Model AT 2400 from one Yeap Sang Soon, a crew of the ship, M.S. Rasa Sayang as an inducement for doing an act in relation to your principal's affairs, to wit, to allow Yeap Sang Soon to take the other units of the Akai Stereo Set out of the Swettenham Pier without paying customs duty and thereby committed an offence punishable under s. 4(a) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57).

Against that conviction he had appealed whilst the public prosecutor had appealed against the sentence as being manifestly inadequate.

In broad outline, the prosecution case was that Yeap Sang Soon (PW8), a steward on the boat "the Rasa Sayang" and the person named in the charge, had bought an Akai Stereo Set, consisting of various parts, being Exhibits P5 to P11, at Singapore, when the boat called there, and had intended bringing the same to his home in Penang. When the boat called at Georgetown, Penang, some ten days later, he sent his friend and colleague Stephanie (PW9) to the customs check point, which was within the area of the Penang Port Commission (the PPC) compound, to enquire what the customs duty on the goods would be. While the goods were still on board ship Stephanie enquired from the customs officer on duty at the customs check point, who was the appellant, regarding the duty payable, and the latter replied that it would be RM400. Stephanie returned to the boat and conveyed this to Yeap who then requested Stephanie to go back to the appellant and attempt to have the duty reduced. Stephanie duly complied; whereupon, the appellant reduced the duty to RM200. Stephanie then returned to the ship and conveyed this to Yeap. Yeap and Stephanie then both went up to the appellant who confirmed that the duty payable would be RM200 and they both then returned to the boat.

With the assistance of three of his colleagues - Shino, Tony and Ridzuan, Yeap then brought the stereo set ashore, while Stephanie walked ahead of the group to pay the duty of RM200 - this she did, to the appellant, but got no receipt for it although she requested for one, the appellant remarking that a receipt was not necessary.

At the customs check point, the appellant, who was then the only officer on duty, requested that the boxes which contained the various parts of the stereo set be opened. The appellant then went through all the parts and in doing so noticed the tuner (P11) and remarked that it must be worth about RM600, but Yeap said that it cost only RM200 in Singapore. The appellant then said that he wanted to have the tuner, adding that Yeap could have back the RM200 duty which had earlier been paid by Stephanie on behalf of Yeap, and was now lying on the table. Yeap agreed, though not without some hesitation, and took back the RM200 while the appellant took the tuner, despite Yeap remarking that without the tuner he would not have a complete set. The appellant then told Yeap and his party to leave with the other parts and that no one would stop them from leaving the PPC compound, though how this could be achieved was a little hard to understand as, after passing the customs check point, Yeap and his party would have had to go through the PPC security check point at which was a barrier manned by PPC security officers whose duty it was to call upon alighting passengers with dutiable goods to produce receipts for customs duty paid or a letter of release for the goods from the ship - a fact which must undoubtedly have been known to the appellant.

Assisted by his colleagues, who carried the other parts of the stereo set, Yeap and Stephanie left the customs check point and proceeded to the PPC security check point where they were stopped at the barrier by two or three PPC security officers who questioned the party as to what goods they were carrying and, upon being told of the same, called for receipts showing that customs duty thereon had been paid or a letter of release from the boat without which the goods could not be taken out but this Yeap was unable to do.

Clearly, Yeap found himself in a difficult position for he was in possession of dutiable goods on which duty had not been paid and which he was attempting to take out of the security area - an offence under the Customs Act. So, he then returned to the appellant and attempted to get a receipt from the appellant but the latter declined to give him one, adding that Yeap should go back to the boat and get a letter of release. One of Yeap's colleagues, Shiro Tan, did so and obtained a letter of release (Ex. P18).

The appellant then came out of his office and shouted at the PPC security officers questioning their authority to stop Yeap and his party. Auxiliary Inspector Murugesan (PW5) who was at the Police Station at the PPC wharf area heard the commotion and approached his men Mohd Ismail (PW7) and Aruldas (PW6) who made a complaint that "these four persons (including Yeap) wanted to take out goods without an official receipt of duty paid". One of the four then told him that they had met a customs officer and had settled the matter. On further questioning they said that the customs officer had accepted RM200 and later exchanged it for the tuner. While he was still questioning the four, the appellant came and shouted at Murugesan saying:

> what authority have you got, what powers have you got, what powers have got to detain these people?

Murugesan then drew the attention of the appellant to the goods. The appellant said:

> This is my case and I will settle the matter. Do not interfere.

Murugesan then tried to contact his superior officer Jalaluddin but failed to do so. In the meanwhile, another customs officer Seah Cheng Cheam (DW3) approached Murugesan and requested that the case be handed over to him but Murugesan declined saying that he had no such power.

On instructions from his superior Jallaludin, Murugesan reported the matter on the telephone to the Anti Corruption Agency. The appellant then returned to his office and Seah then approached Murugesan for help. He said:

> We are all government servants working in one place and we should help each other." Murugesan replied that he had no powers to take any action or to make any decision.

Seah then left and later the Anti Corruption Agency officers arrived - they were Elyias (PW10) and Anthony Nelson (PW4). Murugesan then explained to them what had transpired. They then asked him where the appellant was. Murugesan then pointed out the office of the appellant - it was dark and the door was closed. Elyias and Nelson, followed by Murugesan walked up to the office of the appellant. Elyias knocked on the door and a few seconds later the appellant opened the door. It was now about 3 a.m. Elyias recovered the tuner, which was lying on the customs counter, and also the customs occurrence book, P3, which was to be the lynch pin in the defence case because in it the appellant had recorded in his personal handwriting the words:

> Detained temporarily 1 Akai Stereo Model AT 2400 Tuner until the rightful owner Miss Stephanie comes to pay the duty, because as I was about to access the tuner, Miss Stephanie was called over to the port security office.

Before me, it was accepted that the crucial question in the case was whether this entry in the occurrence book was genuine, in the sense that it was a normal contemporaneous entry made in the ordinary course of duty, or a dishonest fabrication, made as a result of an afterthought, in anticipation of trouble and for the purpose of bolstering the case for the defence. It goes without saying that if having regard to all the evidence there was an ambiguity regarding this question, then that ambiguity had to be resolved in favour of the appellant. I shall, in the course of this judgment, be dealing with this issue at some length.

At the close of the case for the prosecution, it was submitted that the appellant had no case to answer but the learned President refused to accede to this submission and called for the defence.

Thereafter, the appellant entered upon his defence which he made from the witness box.

The appellant testified that at about midnight on the day in question he was attending on an agent of a vegetable importer named Stephen Lim (DW2) who had called with declaration forms, when Stephanie came into his office bringing along with her a single package wrapped in black plastic material. He denied that she had come to him earlier, empty handed to negotiate the duty payable.

The appellant who was then engaged in signing the documents presented by Stephen Lim, asked Stephanie what the package contained. Stephanie's response was that she was in a hurry as she had to catch the Rasa Sayang which was leaving at 6 a.m. Stephanie also placed the package on the customs counter and opened it. The appellant saw that it contained the tuner. The appellant then asked her for the relevant documents but she replied that she had none, so he asked her what the purchase price was. But her response was that it was old and cheap. The appellant however was not prepared to accept that and expressed the view that it was new, at the same time insisting on production of a receipt. But, as no receipt was

forthcoming, the appellant said that he exercised his discretion and estimated the value of the tuner at RM500 adding that on this basis the duty was roughly RM287.50, based on 45% duty and 5% sales tax.

Stephanie then wanted to know how the appellant had arrived at the quoted sum. So the appellant said that he worked it out step by step and, as he did so, Stephanie was called out by somebody from outside; she left, but just before she did so, the appellant told her that the tuner would have to be left in his room. The appellant had also got her name and proceeded to make the entry quoted above in his occurrence book. Stephanie then left saying that she wanted to go to the PPC office. The appellant then resumed attending on Stephen Lim.

Later, curious as to why Stephanie had not returned to his office, he proceeded to the port security office as he wanted to know what was going on; why she was called to the port security office. It was at this point of time that the appellant said that he first saw some black packages which contained the other stereo set parts Ex. P5 to P10 and P12, and standing nearby, Stephanie and her friends.

Murugesan then approached the appellant, in an angry manner and, to quote the appellant:

> He said I was trying to help them. Then I told him if you want to report, you can report. So I went back to my post. I had to deal with Stephen Lim.

The appellant added:

> I did not tell PW5 (Murugesan): 'This is my case. I will settle the matter. Do not interfere'.

Touching on his prior relationship with Murugesan and, in particular, suggesting that the latter bore him an ***animus,*** the appellant said this:

> There was a clash between me and PW5 (Murugesan) that night. I had a misunderstanding with PW5 in 1977 - late. When the Indian ship Chidambaram came to Penang, PW5 brought seven bottles of brandy from the ship and wanted to take it out of the port area. He was stopped by a customs officer. So he approached me for help, But, I refused so he warned me verbally that today is 'customs day', tomorrow will be PPC's day'.

The appellant denied that he told Yeap, Stephanie or anyone else that he was prepared to let them go with the other goods if he was given the tuner. In particular, he denied that he had taken RM200 from Stephanie and so he asserted that there was no truth in the allegation that he had returned the RM200 in exchange for the tuner.

Describing the procedure when passengers disembark with dutiable goods the appellant said:

> When I assess duty money is paid to me. There is a receipt book. After the money is paid they go to see the security (people) and if they are satisfied there are receipts, they can go. The security (people) will check the receipts.

The point the appellant was here making was that he knew that no passenger with dutiable goods who had stopped at his post could possibly pass through the PPC security post without being asked to produce receipts to show that duty had been paid. Indeed, he said as much and for this I would quote him again:

> I deny I allowed Stephanie and others to go away with seven sets. I am aware that the goods will be checked at the security gate. I will not allow goods to be taken away without paying duty.

Explaining why the lights in his room were off when the Anti Corruption Officers knocked at his room he said:

> When nobody is there, the situation is quiet, we take time to rest.

The defence then called Stephen Lim, aged 33 years, a forwarding agent for certain companies, who testified that on 16 June 1978, at about midnight, he had called at the customs post manned by the appellant to clear goods, to wit, vegetables, for his principals which had arrived by boat. Those goods, he said, were described in the Customs Declaration Forms Exhibits D19A, B, C & D.

This witness further testified that while the appellant was dealing with him, a woman walked into the appellant's room with a parcel wrapped in black plastic material which she had placed on the counter. On the request of the appellant, she opened the parcel and Lim noticed that in it was the tuner. The appellant then called for "the receipt and any other documents like captain's letter from the ship" but she was unable to comply. At this point, Lim said he left for his lorry which was parked about 30 to 40 feet away to ask his "lorry men to wait."

One or two minutes later, Lim said that a male Chinese came and called out "Chu lai". He then saw the woman leave the appellant's room. He did not know where she went. Lim then re-entered the appellant's room and noticed that the appellant was writing something in a book "something like P3", that being the occurrence book. The appellant then left his room and returned a few minutes later to deal with Lim. The appellant checked the vegetables loaded on the lorry which Lim was seeking to have cleared. This was after midnight on 17 June 1978, though Lim first saw the appellant shortly before midnight on 16 June 1978.

Lim ended his testimony by saying that he was interviewed by defence Counsel the late Mr. Jag-Jit Singh on 6 July 1978 and his statement, being D20, was recorded on that day.

The last witness for the defence was Seah Cheng Chuan (DW3), a customs officer, attached to the Anti Smuggling Division near Weld Quay, Penang, who had been interviewed by the Anti Corruption Agency officers and who, it will be recalled, according to Murugesan, had attempted to intervene on behalf of the appellant and had also pleaded on behalf of the latter saying "we are all government officers working in one place and we should help each other". This witness recalled the night the appellant was arrested. He stated, quite categorically, that he did not know Murugesan at all and so did not talk to him. In particular, he denied telling Murugesan "we are all government servants and we should help each other." He did say, however, that before he left his office on the night in question, he had informed his superior Superintendent Thomas Matthew about the incident and the latter had instructed him "to go there, have a look and inform him."

On that note the defence closed its case.

The learned President in his grounds of judgment has set out, in somewhat extravagant terms, the grounds on which he convicted the appellant. He found that Stephanie and Yeap were "witnesses of truth on all material points". On the other hand, he branded the appellant, Stephen Lim and Seah Cheng Chuan as "wholly unreliable and absolutely unworthy of any credit."

I shall now proceed to analyse the reasons given by the learned President for arriving at the conclusions aforesaid.

After adverting to the consistency in the testimony of Yeap and Stephanie, which appeared upon a comparison being made between what they had said in Court and what they had said to Murugesan when they were stopped at the PPC security gate, namely that the appellant had returned the RM200 bribe in exchange for the tuner as a condition for releasing all the other electronic goods, without levying any duty, the learned President asked the pertinent question:

> Why should PW8 (Yeap) and PW9 (Stephanie) want to frame up the appellant or in any way put the appellant in trouble?

and concluded that they had no reason to do so.

Rightly regarded as a matter of importance, in my judgment, on the question of motive there has unfortunately indeed been a misdirection in the present case. When Yeap and Stephanie were stopped at the PPC security gate, they were in possession of uncustomed goods, that is to say, dutiable goods on which they knew duty had not been paid, and were deliberately attempting to take them out of the wharf area, a clear offence under the Customs Act.

Faced with this predicament they may well have had the necessary motive to lie, if necessary, at the expense of the appellant. Yet, while there are frequent references in the grounds of judgment of the learned President to the improbability of Yeap and Stephanie acting as they did, were the appellant's version the true one, it nowhere reveals consideration of the improbabilities of the appellant's conduct, were Yeap and Stephanie's version true.

That misdirection of himself by the learned President was, I fear, an error which influenced him overmuch for the importance he demonstrably attached to his mistaken view of an absence of motive, must, I think, have coloured his final approach to the issue of credibility.

The second point taken up by the learned President as telling against the appellant was that when Yeap and Stephanie were stopped at the PPC security gate, the appellant had tried to help them, because having accepted the tuner as a bribe and having given them the assurance that they could get all their other goods past the security check point, without any trouble, he was bound to give them this help. The learned President referred to the testimony of Yeap and Murugesan regarding the appellant's intervention, which he accepted as true.

The appellant's version regarding this episode was not even mentioned much less discussed and rejected by the learned President. In all fairness to the appellant, his version should not have found dismissal in silence; some repetition of the defence case will now be inevitable.

It will be recalled that according to the appellant, when Stephanie first appeared before him in his room, she was alone carrying only the tuner, and she being unable to produce a receipt for it, he estimated its value at RM500 and, on this basis, he had estimated the duty payable as being roughly RM287.50. Whereupon, Stephanie had wanted to know how he had arrived at this figure. So the appellant proceeded to explain, step by step, how he had arrived at this figure but, as he did so, he claimed, that Stephanie was called out by somebody from outside, so she left, saying that she was going to the PPC office, but before she did so, the appellant told her that the tuner would have to be left in his room. The appellant also got her name and went on to allege, the important fact, that he had there and then proceeded to make the entry quoted above in the occurrence book which, according to the witness Encik Hussein bin Abdul Rahman (PW2) a senior assistant director of customs, was "a normal entry", adding that events of that sort "occur sometimes".

The appellant's version regarding these facts, it will be recalled, was corroborated by the testimony of Stephen Lim, the forwarding agent, who claimed that he was being attended to by the appellant, when Stephanie walked into the appellant's office carrying the tuner.

After waiting for a while, Stephanie had still not returned, so the appellant left his office and went out to the port security office because, to quote him, "he wanted to know what was going on? Why she had been called to the security office". At the port security office, according to the appellant, Murugesan approached him and angrily accused him of trying to help Yeap and Stephanie. To which the appellant retorted, "if you want to report you can report" and then promptly returned to his office to attend on Stephen Lim.

On his relationship between Murugesan and himself, it will be recalled that according to the appellant there had been an incident in late 1977 when Murugesan had sought the aid of the appellant in order to smuggle five bottles of brandy from the Chidambaram, but the appellant had declined the request which might have given cause to Murugesan to bear him an ***animus***. When this incident was put to Murugesan, he denied it but that by itself did not relieve the learned President of the necessity of considering the point and making a finding thereon.

But, even more important than this omission was the failure of the learned President to ask himself the question: Would the appellant have dared run the risk of taking the tuner from Yeap, as a gratification, for allowing him to remove the rest of the goods, without levying any duty thereon knowing full well that Yeap could not possibly have got those goods past the PPC security gate which was manned not by customs officers but by Murugesan's men, whose duty it was to call for customs receipts showing that duty had been paid? Common sense will supply the answer to this question.

The audacity of the alleged misdeed, is lacking alike in cunning and in contrivance. It is difficult indeed to associate simplicity so absolute with a course so perilous, yet nowhere in his grounds of judgment did the learned President even mention this formidable factor which told in favour of the appellant.

To take the point a little further, if the appellant's version of the events on the night in question were true, the conduct of Yeap and Stephanie in attempting to take uncustomed goods, on which they knew that duty had not been paid, through the PPC security gate, without attracting the attention of the appellant, was perhaps understandable. This was another factor which the learned President would appear to have overlooked.

The final piece of evidence, which consists of the entry in the customs occurrence book, hereinbefore reproduced, requires the most careful consideration, as I would regard it as the crucial point in the case, and indeed the learned deputy accepted that position.

Turning once again to the grounds of judgment the learned President made what seems to be the somewhat reluctant concession that "*prima facie*, standing alone, the entry is in the accused's favour" but then immediately added that "the evidence of PW8 (Yeap), PW9 (Stephanie) and PW5 (Murugesan) destroyed the veracity of that entry". With respect, that was begging the question, since the credibility of Yeap, Stephanie and Murugesan was itself a live issue from beginning to end and from first to last of this long and tedious trial. Be that as it may, the learned President arrived at the conclusion that because the appellant saw that Yeap and Stephanie had been stopped at the security gate with uncustomed goods on which duty had not been paid, and "had spilled all the beans" and Murugesan was taking steps to report the matter, "a noose was looming around the appellant's neck", so "naturally the only avenue of escape for the appellant was for him to make an entry in the customs occurrence book that the tuner was detained pending payment of duty".

More particularly, the learned President impugned the entry in the occurrence book on the ground that it merely stated that Stephanie was called out as the appellant was about to assess duty on the tuner, **whereas** according to the appellant's testimony in Court "he had already assessed (duty) on the tuner".

With respect, it would appear that the learned President had misconstrued the appellant's testimony because the record provided shows that he had merely said "I told her roughly that the duty was roughly RM287.50 cents" and upon being queried by Stephanie as to how he had arrived at this figure, he was in the process of explaining to her "step by step" when she was called away by someone. In other words, at that point of time the appellant had not yet finalised the assessment of duty especially since Stephanie might still have successfully persuaded the appellant to reduce the duty proposed had she not been interrupted. So, I fail to detect any material contradiction between the appellant's testimony and the portion of the entry which reads "as I was **about to assess** the tuner, Miss Stephanie was called over to the port security office". (Emphasis supplied).

In any event, the appellant was never cross-examined on the point and so was denied the opportunity of explaining what, at best, was only an apparent discrepancy.

But, more to the point, a scrutiny of the record of appeal shows that at no time while the appellant was in the witness box did the prosecution or the learned President put a single question to him suggesting that the entry in the customs occurrence book was a lying entry prepared in the circumstances suggested by the learned President in order to bolster his defence. The appellant was thus given no real chance of dealing with that suggestion.

There is clear authority for the proposition that if on an essential part of the defence case the prosecution intend inviting the Court to hold that the defence evidence should be disbelieved then Counsel for the prosecution ought to cross-examine the appellant or, at any rate, to make it plain while the appellant is in the witness box, that his evidence on the point is not accepted. (see *R v. Hart* 23 CAR 2021). The learned President paid no heed to this aspect of the case but, on the other hand, made heavy weather of the fact that at no time during the cross-examination of Stephanie, did Counsel put it to her that Stephen Lim, was present when she was in the appellant's room. Indeed, the learned President found, mainly on this score, that Stephen Lim was not even present in the customs office when Stephanie was there, thereby agreeing with a suggestion by the prosecution that he had made up his evidence.

In the present case, there was no dispute that the defence of the appellant (which was manifestly clear from the entry in the occurrence book, produced by the prosecution) had been put to the prosecution witnesses concerned, the only omission on the part of the defence Counsel being to put it to Stephanie that Stephen Lim was present in the customs office with her at the material time.

The next point to note is that when the appellant made his defence from the witness box he referred to Stephen Lim's presence more than once and also referred to the customs declaration forms submitted by Stephen Lim. He was asked under cross-examination by the prosecution if he had at an earlier stage told his Counsel, Mr. Jag-Jit Singh, about the role of Stephen Lim and he replied that he had. Counsel himself did not repudiate that statement and, indeed, when Stephen Lim testified on behalf of the appellant, he (Stephen Lim) had identified his proof of evidence, being Ex. D20, which bore the date 20 July 1978, that is to say, about one month after the appellant's arrest or, in other words, years before the trial commenced.

It seems to me that having regard to the appellant's evidence that he had told his Counsel about the role of Stephen Lim long before the trial commenced, confirmed as it was by the unchallenged proof of evidence (D20), the learned President ought to have asked Counsel why he had not put it to Stephanie that Stephen Lim was present at the time the appellant

dealt with her. Had he done so, I have no doubt that Counsel would have explained that either he had overlooked the point or that he did not consider it necessary to put the point in cross-examination.

Another reason the learned President gave for finding that Stephen Lim was never present in the customs office at the material time was that although he had testified that Stephanie had walked into the appellant's office carrying only a tuner, there was the contrary testimony of Stephanie and Yeap that all parts of the stereo set, and not just the tuner, had been so brought. Expressing himself in somewhat intemperate language the learned President described this testimony of Stephanie and Yeap as "incontrovertible, reliable and unimpeachable". With respect, this was another example of question begging, because the credibility of Stephanie and Yeap was, as I have said, very much a live issue throughout the trial, yet the learned President appears to have treated it as sacrosanct and beyond challenge.

The final reason the learned President gave for finding that Stephen Lim was never present in the customs office at the material time was because he had omitted to corroborate the appellant's testimony that the appellant had roughly estimated custom's duty at RM287.50 on the tuner. With respect to the learned President, a mere omission as to a point of detail of this sort is seldom, if ever, a discrepancy and, furthermore, considering that the witness was testifying as to events which occurred nearly 6½ years previously the omission may very well have been due to an inability to recall.

It seems to me that had the learned President approached the question of the credibility of Stephen Lim from all angles, as he undoubtedly should have, instead of adopting a Nelsonian approach, he would most probably have not rejected the testimony of this witness. And, it goes without saying that had the learned President accepted the testimony of Stephen Lim, he being apparently an independent witness with no axe to grind, then there would have been corroboration of the appellant's defence of the most potent kind and, on this further ground also, the prosecution case must surely have collapsed.

Looking back, it is accurate to say, and indeed the appeal was argued before me on the basis, that the decision of the learned President turned entirely upon his assessment of the credibility of witnesses, no question of law being involved.

In such a situation, it is settled law that an appellate Court ought not to interfere provided always that there are no grounds for holding that matters relevant to the issue of credibility have been overlooked or misunderstood.

Now, it is true that the learned President as a trier of fact had a great advantage over this Court for he saw and heard the witnesses whilst I did not. But, it has been said by the sages of the law, and I respectfully agree, that demeanour alone is not a touchstone of truth. A convincing witness may be an accomplished liar, for he may have reconstructed the facts in his mind so as to support his own version of the transaction under investigation. Conversely, a man who appears shifty may yet be truthful. It is for this reason that a Judge of fact should test the oral evidence by reference to the objective facts, the contemporary documents (if any), the witness' motives, and the probabilities of the case. In this context, I would draw attention to the following passage in the judgment of the High Court in England in the case of *Armagas Ltd v. Mundogas SA ("The Ocean Frost")*, [1985] 2 Lloyds Rep 1:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth.

Accordingly, if it can be demonstrated that the trial Judge has fallen into error in relation to such matters, as I hold was the case here, then an Appellate Court will act upon its own view of the conflicting evidence. (see *Coglan v. Cumberland* [1898] 1 Ch D 24 and *Bigsby v. Dickinson* [1876] 4 Ch D 24).

And, in the words of Lord Thankerton in *Watt Or Thomas v. Thomas* [1947] AC 488, which, I would regard as of particular pertinence in the present case:

> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

In summary, it is manifestly clear that the learned President had failed to take into account, or to give proper weight to, or to draw proper inference from virtually every fact which told in favour of the appellant. It is, I accept, not incumbent upon a trial Judge to deal with every relevant factor in a long trial, but where there is such a violent conflict of evidence as arose in this case, and where the issues are so grave, an Appellate Court is entitled, and indeed is obliged, to consider carefully whether in the light of the matters referred to in the passage in the judgment of the Court in *Armagas Ltd v. Mundgas* (*ibid*) quoted above, it appears that, in the words of Lord Thankerton in *Watt Or Thomas v. Thomas* (*ibid*) that the trial Judge "has not taken proper advantage of his having seen and heard the witnesses." Having thus considered the matter, I concluded that this was a proper case for my acting upon my own view of the conflicting evidence and, in consequence, I found the grounds of judgment of the learned President to be wholly unsatisfactory.

In all the circumstances, for the reasons stated, the learned President ought to have ruled at the close of the case for the defence that the explanation given by the appellant was both reasonable and probable and more than sufficient to rebut the presumption under s. 14 of the Prevention of Corruption Act 1961, (See *PP v. Yuvaraj* [1969] 2 MLJ 89).

The result, therefore, was that this appeal was allowed, the conviction quashed, the sentence set aside and the appellant acquitted and discharged. In consequence, the public prosecutor's appeal against sentence was dismissed.

Also found at [1991] 3 CLJ 1907